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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 29

DEAN RUSK, Secretary of State,

Appellant,

v.

JOSEPH HENRY CORT

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE

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INDEX

	Page
Statement of Interest	1
Statutes Involved	3
Statement	6
Summary of Argument	7
I. This Court Has Laid to Rest the Proposition that Habeas Corpus Is the Sole Judicial Remedy for Reviewing Administrative Decisions Under the Immigration and Nationality Act	9
II. Legislative History of the Judicial Review Provisions in the Immigration and Nationality Act of 1952	11
(A) Before the Codification of 1952	11
(B) Legislative History of Immigration and Nationality Act of 1952	13
III. The Legislative History of Section 360 of the Immigration and Nationality Act	25
(A) Before the Nationality Act of 1940	25
(B) Section 503 of the Nationality Act of 1940	27
(C) Section 360 of the Immigration and Nationality Act of 1952	31
IV. The Legislative History and Statutory Language Show That the Habeas Corpus Remedy in Section 360 Is Not Exclusive	34
V. Section 360(e) Is Not a "Special Statutory Review Proceeding"	40
VI. The Objectives Which Appellant Describes for Section 360 Do Not Require a Holding That It Is Exclusive	42
Conclusion	44

CITATIONS

Cases:

	Page
Bauer v. *Acheson*, 106 F.Supp. 445 (D.D.C., 1952)	38, 39, 43
Baumgartner v. *United States*, 322 U.S. 665 (1943)	fn. 41
Brownell v. *Tom We Shung*, 352 U.S. 180 (1956)	9, 21
Carmichael v. *Delaney*, 170 F.2d 239 (C.A. 9, 1948)	fn. 24
Chin Yow v. *United States*, 208 U.S. 8 (1907)	23, 24, 26
Eisler v. *Clark*, 77 F.Supp 610 (D.D.C., 1948)	fn. 11
Flemming v. *Nestor*, 363 U.S. 603 (1959)	3
Frank v. *Rogers*, 102 App. D.C. 367; 253 F.2d 889 (1958)	9
Gini v. *Riddle*, 60 F.Supp. 530, 531 (E.D. Penna., 1945)	fn. 35
Gonzales v. *Landon*, 350 U.S. 920 (1955)	fn. 41
Gonzales v. *Williams*, 192 U.S. 1 (1904)	24
Inglis v. *Trustees of the Sailor's Snug Harbor*, 3 Pet. 99 (1830)	36
Kent v. *Dulles*, 357 U.S. 116, 125, 126 (1957)	39
MacKenzie v. *Hare*, 239 U.S. 299 (1915)	37
McGrath v. *Kristensen*, 340 U.S. 162 (1950)	9
McIlvaine v. *Coxe's Lessee*, 2 Cranch 280 (1805), 4 Cranch 208 (1808)	36
Medeiros v. *Watkins*, 166 F.2d 897, dissenting opinion (Frank, J.) 900 (C.A. 2, 1948)	fn. 24
Murray v. *The charming Betsy*, 2 Cranch 64 (1804)	36
Nishikawa v. *Dulles*, 356 U.S. 129 (1957)	fn. 41
Ng Fung Ho v. *White*, 259 U.S. 276 (1922)	fn. 23, 41
Ogoma v. *California*, 332 U.S. 633 (1947)	36
Perez v. *Brownell*, 356 U.S. 44, 52-53 (1958)	fn. 25
Perkins v. *Elg*, 307 U.S. 25 (1938)	9, 27
Paiz v. *Jiminez*, 255 F.2d 54 (C.A. 1, 1958)	40
Quon Quon Poy v. *Johnson*, 273 U.S. 352 (1926)	fn. 23
Rasmussen v. *Brownell*, 350 U.S. 806 (1955)	9
Sanitissima Trinidad, 7 Wheat. 283, 347 (1822)	37
Savorgnan v. *United States*, 338 U.S. 491, 493-4 (1949)	fn. 35
Schneiderman v. *United States*, 320 U.S. 118 (1942)	fn. 41
Shanks v. *DuPont*, 3 Pet. 242 (1830)	36
Shaughnessy v. *Mezei*, 345 U.S. 205 (1952)	41
Shaughnessy v. *Pedreiro*, 349 U.S. 49 (1955)	9, 21

Stark v. *Wickard*, 321 U.S. 288 (1944) .....
Stewart v. *Dulles*, 101 App. D.C. 280; 248 F. 2d 602 (1959) 38
Talbot v. *Janson*, 3 Dall. 133 (1795) 37
Tang Tun v. *Edsell*, 223 U.S. 673 (1911) ..... fn. 23
Trop v. *Dulles*, 356 U.S. 86, dissenting opinion 125 (1958) ..... fn. 25
United States v. *Gay*, 264 U.S. 353 (1924) ..... fn. 23, 38
United States v. *Ju Toy*, 198 U.S. 253 (1904) ..... 23, 24, 25, fn. 41
Weedin v. *Chin Bow*, 274 U.S. 657 (1927) 20

Statutes and Regulations:

Act of December 17, 1943, 57 Stat. 600 25

Administrative Procedure Act:

Section 2(a), 60 Stat. 237, 238; 5 U.S.C. 1001 11
Section 10, 60 Stat. 243; 5 U.S.C. 1009 ..... 3, 4, et seq.
Section 10(b), 60 Stat. 243; 5 U.S.C. 1009(b) 4, 23, 40
Section 12, 60 Stat. 244; 5 U.S.C. 1011 ..... 4, 11, 21

Chinese Exclusion Laws:

22 Stat. 58 24
23 Stat. 332 24
24 Stat. 414 24
25 Stat. 504 24
26 Stat. 566 24
Act of May 5, 1892, 27 Stat. 25, 8 U.S.C. 286 24
32 Stat. 176 24
33 Stat. 397, 328 24

Code of Federal Regulations:

22 C.F.R. 42 43
22 C.F.R. 50 43
22 C.F.R. 51 43

Declaratory Judgment Act, 48 Stat. 955; 28 U.S.C. 2201 ..... 4, 23
District of Columbia Code, 11-306 27
Federal Rules of Civil Procedure, Rule 57 5

Page

Immigration and Nationality Act of 1952:

Section 101(a); 66 Stat. 169; 8 U.S.C. 1101 43
Section 104(a); 66 Stat. 174; 8 U.S.C. 1104 42, 43
Section 203, 66 Stat. 178-179; 8 U.S.C. 1152 43
Section 215, 66 Stat. 190; 8 U.S.C. 1155 35
Section 273, 66 Stat. 227; 8 U.S.C. 1323 35
Section 301(a), 66 Stat. 235-236; 8 U.S.C. 1401 35, 36
Section 360, 66 Stat. 273; 8 U.S.C. 1503 5, 6, et seq.
Section 360(b), 60 Stat. 273; 8 U.S.C. 1503 5, et seq.
Section 360(c), 60 Stat. 273-4; 8 U.S.C. 1503 6, et seq.

Internal Security Act of 1950, 64 Stat. 987; 50 U.S.C. 781 13

Nationality Act of 1940:

Section 503, 54 Stat. 1171-1172; 8 U.S.C. 903 22, 27, 31

Social Security Act:

Section 205(g), 53 Stat. 1370; 42 U.S.C. 405(g) 39
34 Stat. at L. 1228 37

United States Code:

28 U.S.C. 2282 7
28 U.S.C. 2284 7

Miscellaneous:

Analysis of H.R. 5876, Legislative History, Immigration and Nationality Act, 1951-1952, Vol. 2, JK 1001, A-3513, Department of Justice 17, 18
Analysis of S. 716, General Counsel, Immigration and Naturalization Service 16, 32
Analysis of S. 3455, General Counsel, Immigration and Naturalization Service, Legislative History, Immigration and Nationality Act, 1951, Vol. 1, JK 1001, A-3513, Department of Justice 14
Anderson, Actions for Declaratory Judgment, pp. 324-325 27
Borchard, Declaratory Judgments, p. 398 27
Brief of Solicitor General, *Brownell v. Rabenstein*, No. 300, October Term, 1953 fn. 18

Page

Brief of Solicitor General, *Brownell v. Shaune*, No. 43, October Term, 1956 fn. 18, 32

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Codification of the Nationality Laws of the United States, H.R. Comm. Print., pt. 1, 76th Cong., 1st Sess., Section 406, pp. 504-505 25, 26

86 Cong. Rec. 13,247 28

96 Cong. Rec. 10,460 12

98 Cong. Rec. 4302 19

98 Cong. Rec. 4416 19

98 Cong. Rec. 5626 21

98 Cong. Rec. 5778 20

Dept. State Press Release 226 (1959) fn. 39

Hearings before the Committee on Immigration and Naturalization, House of Representatives, 76th Cong., 1st Sess., on H.R. 6127, superseded by H.R 9980, pp. 291-292 28-31

Hearings before the President's Commission on Immigration and Naturalization, Statement of Hon. John F. Kennedy, October 2, 1952 p. 322 33

H. Doc. 353, 78th Cong. 1st Sess. 25

H.R. 10, 81st Cong., 2nd Sess., Section 5 12, 13

H.R. 2379, 82nd Cong. 1st Sess 15

H.R. 2816, 82nd Cong. 1st Sess. 15

H.R. 5678, 82nd Cong. 1st Sess. 16, 18, 19

H.R. 6652, 80th Cong. 2nd Sess. 11

H.R. 9490, 81st Cong., 2nd Sess. 13

H.R. 9980, 76th Cong. 3rd Sess. 27

H.Rep. 1365, 82nd Cong. 2nd Sess., pp. 27-28 18, 19

H.Rep. 2096, 82nd Cong., 2nd Sess., p. 127 20

H.Rep. 2140, 80th Cong., 2nd Sess., p. 1 11

Immigration Manual, 1946, ed. Immigration and Naturalization Service fn. 25

Joint Hearings before the Subcommittees of the Committees of the Committees on the Judiciary on S. 716, H.R. 2379 and H.R. 2816 16, 32, 33

Public Law 414, 82nd Cong 18

Page

Respondent's Brief, *Wong Yang Sung* v. *McGrath*, No. 154, U.S. Supreme Court, October Term, 1949, p. 38 11
S.716, 82nd Cong. 1st Sess. 15, 32
S.1832, 81st Cong. 2nd Sess., Section 6 13
S.2055, 82nd Cong. 1st Sess. 16, 34
S.2550, 82nd Cong. 2d Sess. 18, 34
S.2755, 80th Cong. 2nd Sess. 11
S.3455, 81st Cong. 2nd Sess. 13, 14, 32
S.Rep.1137, 82nd Cong., 2nd Sess., p. 2 13, 18, 34
S.Rep.1515, 81st Cong., 2nd Sess. p. 777 32
S.Rep.1588, 80th Cong., 2nd Sess. 12
S.Rep.2230, 81st Cong., 2nd Sess. 13
S.Rep.2239, 81st Cong., 2nd Sess. 13
S.Rep.2369, 81st Cong., 2nd Sess., p. 3 12, 13
Senate Doc. 248, 79th Cong., 2nd Sess., 212 23

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JOSEPH HENRY CORT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE

This brief *amicus curiae* is submitted with the consent of the parties. Filed with the Clerk of the Court, pursuant to Rule 42 of the Rules of this Court.

Statement of Interest

The American Civil Liberties Union, a national non-profit organization established in 1920, is committed to the inseparable purposes of preserving the democratic principles for which our government was established and to maintaining our civil liberties. Together with all Americans who

prize the blessings of United States citizenship and the privileges of freedom which it brings, it seeks to guard against arbitrary deprivations of citizenship.

The present appeal presents two questions—one substantive, one procedural—but each of far-reaching importance.

The substantive question whether the Congress has the constitutional power to expatriate native-born citizens who have remained outside of the United States during wartime for the purpose of evading service in the armed forces has been examined by the *amicus curiae* in its brief in *Kennedy* v. *Mendoza-Martinez*, No. 19, in connection with the predecessor statute, Section 401(j) of the Nationality Act of 1940. The *amicus curiae* urges the reasons set forth there, without further restatement here, in support of its views that Section 349(a)(10) of the Immigration and Nationality Act is unconstitutional.

The second question, although relating to procedure, poses an issue of even greater significance the accessibility of the courts of the United States to persons who have been expatriated by the determination of administrative agencies. Were the position which the appellant urges upon this Court to prevail, it would severely circumscribe the ability of a citizen to obtain a judicial determination of his claim to citizenship against an adverse ruling of the executive.

The Solicitor General's Brief asks this Court to take a giant step backward—to deny citizenship claimants the benefit of what has become known as the Magna Carta of administrative reform—the Administrative Procedure Act. As the materials in our brief will show, the appellant is attempting to win in this Court a battle which the predecessors of his colleague, the Attorney General, lost in three sessions of Congress between 1948 and 1952, which

they have repeatedly lost in this Court in other cases involving fundamentally the same question, and which has lost the sympathy and support of other officials in the Executive branch.

The President of the United States, while a Representative in Congress from Massachusetts, urged that there be "a less technical and less expensive method of review" of immigration and nationality decisions "to prevent possible capricious action by administrative officials."[1]

Today the Secretary of State, through the Solicitor General of the United States, seeks from this Court a decision which would require a person who claims to be a citizen of the United States to go to jail before he could obtain access to the courts to review the denial of his claim by administrative officials.

Whether there is any legal warrant or historical basis for appellant's position will be examined in this brief. Certainly, as a matter of policy, there can be no justification for extracting detention and confinement as the price which an American citizen must pay in order to "prevent possible capricious action by administrative officials," or, as here, to secure a judicial determination that an Act of Congress is beyond its powers under the Constitution.

Statutes Involved

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009, provides in part as follows:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> "(a) RIGHT OF REVIEW.—Any person suffering legal

[1] Hearings Before the President's Commission on Immigration and Naturalization, Statement of Hon. John F. Kennedy, October 2, 1952, p. 322.

wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law."

Section 12 of the Administrative Procedure Act, 60 Stat. 244, 5 U.S.C. 1011, provides in part:

"No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly."

The Declaratory Judgment Act, 48 Stat. 955, 28 U.S.C. 2201 provides:

"'In a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment and shall be reviewable as such."

Rule 57 of the Federal Rules of Civil Procedure provides in part as follows:

"... The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. ..."

Section 360 of the Immigration and Nationality Act of 1952, 66 Stat. 273, 8 U.S.C. 1503, provides in part as follows:

"(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

"(c) A person who has been issued a certificate of

identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States."

Statement

Appellee was born in the United States in 1927 and lived in this country continuously until 1951. In 1960, while living abroad, he applied for a passport upon which to return to the United States. His application was denied upon a determination that the appellee had lost his citizenship under Section 349(a)10 of the Immigration and Nationality Act of 1952, by remaining outside the United States during a period of national emergency to avoid service in the armed forces of the United States. He filed suit against the Secretary of State in the District Court for the District of Columbia seeking declaratory and injunctive relief. In the complaint he alleged that he had not remained abroad to evade his military obligation and that Section 349(a)10 was unconstitutional. The Secretary of State, by motion to dismiss, and in his answer, asserted *inter alia* that the District Court was without jurisdiction to entertain the declaratory judgment action because Section 360(b) and (c) of the Immigration and Nationality Act of 1952 provided

the exclusive remedy for one residing abroad who claimed a denial of citizenship rights, and also that Section 349(a)(10) was constitutional.

Both parties moved for summary judgment before a three-judge District Court convened under 28 U.S.C. 2282, 2284. The court granted appellee's motion, holding (1) that the government had shown by clear, convincing, and unequivocal evidence that appellee had remained abroad to evade his military obligation; (2) that the court had jurisdiction of the declaratory judgment action; and (3) that Section 349(a)(10) was unconstitutional. This appeal followed.

Summary of Argument

The decisions of this and other courts have established that persons outside of the United States may assert their claims to citizenship in the courts of the United States notwithstanding their nonresidence, as well as a corollary right of nonresident citizens to maintain an action to compel the issuance of a passport.

The Solicitor General would carve an exception into the jurisdiction over these cases in the courts of the United States. He urges this Court to adopt the doctrine that a native-born citizen of the United States, who has been expatriated by an administrative decision of the Secretary of State while exercising his constitutional right to travel abroad, may obtain judicial review of the Secretary's action only at the pain of returning to the United States as an alien, "stopped at the limit of our jurisdiction", submitting himself to detention in the custody of another administrative officer, the Attorney General, and thereafter seeking a determination in an action for habeas corpus of the legality of his detention by that officer.

The doctrine which the Solicitor General urges is egregiously wrong. The legislative history of the Immigration

and Nationality Act of 1952 reveals that the Department of Justice sought legislation from Congress which would confine citizenship claimants to a remedy of habeas corpus but that Congress expressly rejected the request, and reaffirmed the applicability to that Act of the provisions of the Administrative Procedure Act.

Section 360 of the Immigration and Nationality Act, *supra*, which appellant says was intended by Congress to limit a citizenship claimant's judicial remedies, was intended merely to afford certain claimants to citizenship with the opportunity to present themselves physically at a point of entry to the United States and to preclude that opportunity to others. Its purpose was to cut off the opportunity which *aliens* had abused under Section 503 of the Nationality Act of 1940, *supra*, to make fraudulent entry into the United States to prosecute spurious citizenship claims.

Nowhere in the extensive pages of the legislative history of this provision is there any suggestion that Section 360 was intended to restrict the right of a citizen of the United States to obtain the judicial redress, which has been safeguarded to him by the Administrative Procedure Act, of a denial of his citizenship by the Secretary of State.

Moreover, the position of the Solicitor General, if adopted by this Court, would paralyze a citizen of the United States, who is exercising his constitutional right to travel abroad, in seeking the guaranty of the due process afforded by the Constitution while it would immunize the Secretary of State from judicial review of his acts of expatriation.

Congress did not require this in the Immigration and Nationality Act. It sought to prevent it in the Administrative Procedure Act. The Constitution forbids it in the Fifth Amendment.

I. This Court Has Laid to Rest the Proposition That Habeas Corpus Is the Sole Judicial Remedy for Reviewing Administrative Decisions Under the Immigration and Nationality Act.

It is not without significance that the appellant's fundamental position—that a citizenship claimant or an alien is restricted to habeas corpus as his remedy for challenging an administrative decision—has been urged repeatedly in this Court and in various lower courts, and that, at least since the enactment of the Immigration and Nationality Act of 1952, it has been uniformly rejected.

Shaughnessy v. *Pedreiro*, 349 U.S. 49 (1955) disposed of the contention that habeas corpus is the exclusive remedy for deportable aliens. *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956) rejected the claim that it is the exclusive remedy for excludable aliens. *McGrath* v. *Kristensen*, 340 U.S. 162 (1950), prior to the 1952 statute, and *Rassmussen* v. *Brownell*, 256 U.S. 806 (1955) subsequent to that Act, refused to confine determinations of eligibility to citizenship to habeas corpus proceedings.

Long before, this Court had held in *Perkins* v. *Elg*., 307 U.S. 25 (1938) that the Declaratory Judgment Act is available to declare the rights of persons whose claim to citizenship has been denied by the Secretary of State. More recently, the District of Columbia Circuit, in a decision which the then Attorney General did not seek to bring to this Court for review, held that subsection (a) of the identical Section 360 of the Immigration and Nationality Act, 8 U.S.C. 1503, which the appellant here says provides the appellee's sole judicial remedy, is not exclusive, and that Section 10 of the Administrative Procedure Act permits an additional action for a declaratory judgment to determine a citizenship claim. *Frank* v. *Rogers*, 102 App D.C. 367, 253 F. 2d 889 (1958).

These decisions are all distinguishable, of course, from the precise jurisdictional issue raised below. What is important here, however, is that the arguments to sustain the present appellant's position are the identical arguments made and rejected in the cases cited.

It should suffice, without more, to say that if a deportable alien, if an excluded alien, if an alien who seeks merely to establish that he is eligible to become a citizen—if all of these persons have the right of judicial review under the Administrative Procedure Act and may obtain access to the courts of the United States in declaratory judgment proceedings, without the necessity of subjecting themselves to confinement in order to obtain a review of the legality of their detention in habeas corpus proceedings, no less can be permitted to a person like the appellee, who is a native-born citizen of the United States and who has been expatriated by an administrative decision of the Department of State.

The narrow issue here is whether Congress has expressed its intent to exempt from Section 10 of the Administrative Procedure Act the decisions of the Secretary of State which deny citizenship and its rights to persons who are outside of the United States.

Appellant says that Congress has made it "convincingly clear" (Br. 45) that a person outside of the United States who has been denied his claim to citizenship by the Secretary of State has as his sole judicial remedy an application for a writ of habeas corpus, to be maintained at a port of entry to the United States, against the Attorney General or his agents.

In this brief we shall show that the intent of Congress as to judicial determinations of citizenship, whether by persons in the United States or abroad, was no different than it was for the judicial review of deportation and exclusion orders, and that judicial review by way of declaratory judgment

relief is available for the administrative acts of the Secretary of State in nationality decisions.

II. Legislative History of the Judicial Review Provisions in the Immigration and Nationality Act of 1952

(A) *Before the Codification of 1952:*

The history begins in the 80th Congress with two bills, H.R. 6652 and S. 2755, each of them requested by the Department of Justice. See Respondent's Brief, *Wong Yang Sung* v. *McGrath*, No. 161 in this Court, October Term 1949, p. 38.

H.R. 6652 sought to amend Section 2(a) of the Administrative Procedure Act, 60 Stat. 237-38, 5 U.S.C. 1001, by adding "functions or proceedings authorized or required pursuant to the immigration or nationality laws" to the express exclusions from the Act. The House Judiciary Committee, in reporting the bill favorably, declared that the "sole objective of this bill is to exempt the immigration and nationality laws from the provisions of the Administrative Procedure Act of June 11, 1946, except as to Section 3 thereof." The Committee explained "it is necessary to provide expressly for an exemption from the Administrative Procedure Act because of the provisions found in Section 12 of that Act . . ." H. Rep. 2140, 80th Cong. 2nd Sess., p. 1. No action was taken by the House on the bill.

S. 2755, as originally introduced, had the same purpose. The Senate Judiciary Committee, however, reported the "judgment of the Committee that the functions or proceedings authorized or required pursuant to the immigration or nationality laws to the extent they are held to be within the purview of the Administrative Procedure Act[2] should

[2] The District Court for the District of Columbia had recently held in *Eisler* v. *Clark*, 77 F. Supp. 610 (1948), that the Administrative Procedure Act embraced deportation proceedings.

not at this time be excluded from the operation of the Administrative Procedure Act." S. Rep. 1588, 80th Cong., 2nd Sess. The Committee therefore amended the bill to eliminate the provisions that immigration and nationality decisions be excluded from the Administrative Procedure Act, *ibid.* No action was taken by the Senate.

The efforts to exempt the immigration and nationality laws from the operation of the Administrative Procedure Act were resumed in the 81st Congress with H.R. 10. There the exclusionary clause was more fully developed, embracing as well, the Declaratory Judgment Act and Section 503 of the Nationality Act of 1940. Section 5 provided:

> "Nothing in the provisions of sections 5, 7, 8 and 10 of the Administrative Procedure Act (60 Stat. 239, 241, 242, 243; 5 U.S.C. 1004, 1007, 1009), or the Declaratory Judgment Act of 1934, as amended (48 Stat. 955; 28 U.S.C. 400), shall be applicable to the provisions of this Act or to any law relating to the immigration, exclusion, expulsion, or registration of aliens or to the nationality or naturalization laws of the United States; nor shall the provisions of section 503 of the Nationality Act of 1940 (54 Stat. 1171-1172; 8 U.S.C. 903) be applicable in any case which involves a determination of the right of a person to be admitted to or to remain in the United States under the provisions of any of the immediately described laws."

H.R. 10, including the foregoing Section 5, was adopted by the House of Representatives. 96 Cong. Rec. 10468.

In the Senate, H.R. 10 was considered by the Senate Judiciary Committee together with other measures relating to aliens, internal security and passport controls. S. Rep. 2369, 81st Cong. 2d Sess., p. 3. Pertinent here is the fact that the Senate Judiciary Committee disapproved Section

5 of H.R. 10, S. Rep. 2230, 81st Cong. 2d Sess., but approved S. 1832, which at Section 6, provided that judicial review of decisions relating to *expulsion and exclusion of aliens* shall be limited to habeas corpus proceedings. S. Rep. 2230, 81st Cong. 2nd Sess.

However, even this limitation upon judicial remedies was abandoned by Congress, for in the omnibus bill which consolidated H.R. 10 and S. 1832, together with other measures into H.R. 9490, enacted into law as the Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. 781, both Section 6 of S. 1832 and Section 5 of H.R. 10 were dropped. S. Rep. 2369, *supra*.

The Department of Justice and the Immigration and Naturalization Service thereafter renewed their efforts to secure exemption of immigration and nationality decisions in the bills which were to become the Immigration and Nationality Act of 1952.

(B) *Legislative History of Immigration and Nationality Act of 1952*

The Act of 1952 itself began with S. 3455, 81st Cong. 2d Sess., an omnibus revision and codification of the prior immigration and nationality statutes. This bill, prepared with the assistance of "experts from the Immigration and Naturalization Service, the Visa Division . . . and the Passport Division of the Department of State" (S. Rep. 1137, 82nd Cong. 2d Sess., p. 2) expressly limited judicial review of *all* administrative decisions under its provisions to habeas corpus.[3]

[3] Section 106 of S.3455 provided:

SEC. 106. Notwithstanding the provisions of any other law—

(a) determinations of fact by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court;

(b) determinations of law by administrative officers under the pro-

The provisions of this bill were subjected to "detailed analysis and comment" by the interested government agencies. *ibid.*

Section 106 was said in the analysis made by the Immigration and Naturalization Service to provide that—

> ". . . notwithstanding the provisions of any other law, no court shall review determinations of fact by administrative officers under this Act; no court shall review, except by habeas corpus, determinations of law by administrative officers under this Act, and that no court shall review the exercise of discretionary authority conferred upon administrative officers by this Act.
>
> "The provisions of this section appear to be self explanatory and the Service recommends their enactment. The only suggestion which is offered is that the text of the section be redesignated as subsection (a), with appropriate changes of present clauses (a), (b), and (c) to (1), (2), and (3), respectively; and that there be added a new subsection (b) to read as follows:
>
> "'(b) Nothing in subsection (a) of this section shall be held to apply to court proceedings instituted under section 359 of this Act'.
>
> "This change is suggested because section 359 of the bill authorizes the institution of court proceedings for declaratory judgments in nationality cases and in such proceedings it is obviously contemplated that

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visions of this Act or regulations issued thereunder shall not be subject to review by any court except through the writ of habeas corpus; and

(c) the exercise of discretionary authority conferred upon administrative officers by this Act or regulations issued thereunder shall not be subject to review by any court.

> determinations of fact by administrative officers will be subject to court review. Likewise, section 359 itself contemplates a court review of determinations of law by a method other than habeas corpus. Whether or not the specific suggestions for amendment of this section which are here made and the specific suggestions for changes we make in discussing section 359 of the bill are adopted, it appears that the attention of the Congress should be drawn to the apparent conflict between sections 106 and 359 of this bill as they are now drafted. . . ." Analysis, S. 3455, General Counsel, I. & N. Service, Legislative History, Immigration and Nationality Act, 1951, Vol. 1, JK 1061, A-3513-Dept. of Justice.

The bill was revised and reintroduced in the Senate as S. 716, 82nd Cong. 1st Sess. and in the House as H.R. 2379, 82nd Cong. 1st Sess. Those bills modified the original Section 106, *inter alia*, by the addition of subsection (b) which provided:

> ". . . Nothing contained in subsection (a) of this section shall be held to apply to court proceedings instituted under section 360 of this Act."[4]

Hearings were thereafter held on S. 716, H.R. 2379, as well as on an utterly dissimilar bill, H.R. 2816, 82nd Cong. 1st Sess. introduced by Congressman Celler.

Objections were made by diverse legal, social service, religious, and citizenship organizations to the effect of Sec-

[4] That section, as then written, permitted the bringing of an action for judgment to declare a person to be a national of the United States if the claimant is "within the United States". S. 716, H.R. 2379, *supra*. No provision was made there for actions by persons outside the United States or for the admission of such persons to the United States in order to prosecute their claims to citizenship. See *infra*.

tion 106 in exempting deportation, exclusion, and citizenship determinations from the provisions of the Administrative Procedure Act and to the elimination of the opportunity of citizenship claimants abroad to be admitted to the United States to maintain actions for judicial review. Hearings before the Subcommittees of the Committees on the Judiciary, on S. 716, H.R. 2379, and H.R. 2816, (referred to hereafter as Joint Hearings).[5]

Typical of the criticism was the statement of the American Bar Association:

> "We believe that determinations of immigration and naturalization matters as well as citizenship matters should be subject to judicial review provided by Section 10 of the Administrative Procedure Act."

Significantly, both the Immigration and Naturalization Service and the Department of Justice urged retention of Section 106 because it "undertakes to state what has been the traditional provision for judicial review, i.e. habeas corpus." *ibid*, pp. 711-712. See also Analysis of S. 716, General Counsel, Immigration and Naturalization Service, Section 106.[6]

The result in Congress was a victory for the proponents of judicial review under the Administrative Procedure Act.

Further refinements of the immigration and nationality proposals were introduced in the Senate by Senator McCarran as S. 2055, 82nd Cong. 1st Sess. and in the House by Representative Walter as H.R. 5678. The previous Section 106 was deleted from each of these bills.

This modification was not unnoticed by the Immigration

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[5] 82nd Cong. 1st Sess. pp. 106-108, 144, 345-351, 417, 421, 446-450, 528, 536-537, 590-591, 617-618, 671-673.

[6] Their views regarding Section 360 are discussed below under the legislative history of that section.

and Naturalization Service. In its analysis of H.R. 5678, comparable to its prior analyses of S. 3455 and S. 716, it stated:

> ". . . This bill differs from the predecessor bills H.R. 2379 and S. 716, upon which reports were previously made to the Department, in that it fails to carry forward the Section 106 which appeared in those bills. In its report to the Chairman of the Senate Committee on the Judiciary of May 14, 1951, the Department commented upon Section 106 and generally expressed its approval of the provisions thereof. The Department pointed out that the main effect of Section 106 is to spell out for the first time the power of judicial review of the administrative processes.
>
> "It was observed that the provisions of Section 106 taken with Sections 236 and 242, expressed in statutory terms the procedure that was developed over a course of many years in the administration of laws and the judicial review of such administration. *It was further observed that Section 106 undertakes to state that habeas corpus shall be the procedure for obtaining judicial review of administrative decisions in accordance with the traditional development of the field of administrative law. As stated in that report, Section 106 would have obviated review of administrative decisions under this bill by use of Section 10 of the Administrative Procedure Act.*
>
> "*By its elimination, the authors of this bill have necessarily caused the situation to continue whereby decisions of the Service can be reviewed not only by habeas corpus, but also under Section 10 of the Administrative Procedure Act, the basic Federal Declaratory Judgment Act, and also the declaratory judgment action which is provided for in Section 360 of the bill.*

> The continued availability of so many forms of review, which are not necessarily mutually exclusive, adds tremendously to the delays which surround the effective administration of the immigration laws, particularly the provisions thereof which relate to the deportation of aliens from the United States. The problem is well known to the Department and needs no restatement. In the light of all of the existing circumstances and existing facts, the Service recommends that Section 106 of H.R. 2379 be included in the instant bill."
>
> Legislative History, Immigration and Nationality Act, 1951-1952, Vol. 2, JK-1001, .A-3515, Department of Justice. (Emphasis supplied).

Thus, in clear, explicit, and unmistakable language, one of the agencies which was relied upon by Congress for its expertise (S.Rep. 1137, *supra*, p. 2; H.Rep. 1365, 82nd Cong. 2d Sess., pp. 27-28) utterly demolishes appellant's position here that Section 360 is the sole and exclusive judicial remedy for a citizenship claimant abroad.[7]

The congressional sponsors of the immigration legislation did not accede to the Service's request that Section 106 be restored to the bill. (See S. 2550, 82nd Cong. 2d Sess., the final Senate version, and H.R. 5678, the final version as enacted by Congress under Public Law 414, 82nd Cong.) But, significantly for present purposes, they agreed with the evaluation of the effect of the bill upon judicial

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[7] This contemporaneous construction of the Immigration and Nationality Act by the Immigration and Naturalization Service, the amicus curiae here cannot refrain from saying, compels pause at the cynicism with which the Service and the Department of Justice have pressed their contentions in this Court previously and here that the 1952 Act was intended to make habeas corpus the sole remedy for review of administrative determinations. Cf. Briefs of the Solicitor General, *Brownell* v. *Rubinstein*, No. 300, October Term, 1953; *Shaughnessy* v. *Pedreiro*, No. 374, October Term, 1954; *Brownell* v. *Shung*, No. 43, October Term, 1956.

review which the Immigration and Naturalization Service had made.

House Rep. 1365, *supra*, p. 28, states that the bill:

> "Safeguards judicial review and provides for fair administrative practice and procedure (Secs. 235, 242 and 360)."

At the inception of the debate in the House on H.R. 5678, Representative Walter answered a charge that the bill would emasculate judicial review, as follows (98 Cong. Rec. 4302):

> "The Administrative Procedure Act—do you remember the old Walter-Logan bill, which was subsequently enacted into law as the Administrative Procedure Act? Why, this question of unbridled authority in one person is almost an obsession with me. I am the last person in the world who would do anything to destroy the philosophy underlying that type of review."

And again, although directed to the issue of the administrative finality of deportation and exclusion orders:

> "Now we come to this question of finality of the decision of the Attorney General. That language means that it is a final decision as far as the administrative branch of the Government is concerned, but it is not final in that it is not the last remedy that the alien has. *Section 10 of the Administrative Procedure Act is applicable.*" 98 Cong. Rec. 4416.

In the Senate debates, Senator McCarran insisted that it was intended to continue the application of the Administrative Procedure Act except for the special provisions

in respect of the conduct of exclusion and deportation proceedings by special inquiry officers. On May 21, 1952, Senator McCarran observed:

> "*Except for the failure to comply strictly with the dual examiner provisions of the Administrative Procedure Act*, I believe that the procedures set forth are in substantial compliance with the procedural rationale of the Administrative Procedure Act." 98 Cong. Rec. 5626

* * * * * *

> "Let me stress this point, Mr. President: My consistent effort has always been to avoid or eliminate any and all blanket exemptions from the Administrative Procedure Act." *Ibid.*

On the following day he stated:

> ". . . the Administrative Procedure Act is made applicable to the bill. The Administrative Procedure Act prevails now." 98 Cong. Rec. 5778

The report of the House conferees, appointed to resolve the differences between the Senate and the House on the immigration bill, sets forth the final statement of the congressional understanding of the effect of the bill upon judicial review of the administrative decisions. H. Rep. 2096, 82nd Cong. 2d Sess. p. 127. It states:

> ". . . Having extensively considered the problem of judicial review, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, remain within the framework and the pattern of the Administrative Procedure Act. . . ."

This summary of activity by the Department of Justice thus reveals a continuing effort since 1948 on the part of the Immigration and Naturalization Service and the Department of Justice to exempt both immigration and nationality decisions from the operation of the Administrative Procedure Act. Each attempt, as we have seen, was rebuffed by Congress.

Not content with its failure to secure the exemption by congressional action, the Department of Justice sought to obtain it in this Court for deportation and exclusion orders. The result here is set forth in *Pedreiro, supra*, and *Tom We Shung, supra*.

In sum, when the legislative history of the Immigration and Nationality Act is coupled with the express requirement of Section 12 of the Administrative Procedure Act that

> "No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly": 5 U.S.C. 1011.

and the legislative and judicial principle that the Administrative Procedure Act is to be given a "hospitable" construction to accomplish its purpose to "remove obstacles to judicial review of agency action under subsequently enacted statutes like the 1952 Immigration Act" (*Shaughnessy* v. *Pedreiro, supra*, 51), it seems beyond further question that the District Court below has jurisdiction over an action by a person, even if beyond the territory of the United States, who complains that he has suffered a legal wrong because of the action of the Secretary of State in denying him recognition as a citizen and in refusing to issue him a passport.

III. The Legislative History of Section 360 of the Immigration and Nationality Act

In his treatment of the procedures set forth in Section 360, the appellant maintains conspicuous silence regarding their relation to the provisions of the Administrative Procedure Act. Cf. Opinion below which expressly based the jurisdiction of the District Court upon that Act and upon the Declaratory Judgment Act (R. 35).

The burden of his argument is that Section 360 "establishes special procedures for determining claims to American citizenship" (Br. 23), although he makes no claim, and properly so, that the judicial remedy provided there is a "special statutory proceeding" contemplated by Section 10(b) of the Administrative Procedure Act, 5 U.S.C. 1009 (b). (See *infra*)

His position briefly is that but for Section 360 of the 1952 Act and its antecedent provision in Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C. 903, only the constitutional right of habeas corpus is available for a citizenship claimant who is outside the United States;[8] and that by the provisions which Congress adopted in Sections 360(a), (b), and (c), it has "limited the declaratory remedy to citizenship claimants 'within the United States'." (Br. 24).

(A) *Before the Nationality Act of 1940*

The decisional law upon which the appellant relies for his view that habeas corpus was an exclusive remedy before the Nationality Act of 1940, may be put to the side,

[8] This is to say that such a claimant who is not in the custody of United States authorities at a port of entry has no redress of an administrative denial of his citizenship. Appellants' position assumes, without discussion, what has been shown to be erroneous, that the Administrative Procedure Act is not available to afford judicial relief.

if for no other reason than that the Administrative Procedure Act and the Declaratory Judgment Act erase whatever limitations may be said to derive from the earlier holdings of this Court. See Senate Doc. 248, 79th Cong. 2nd Sess., 212, setting forth the legislative history of the Administrative Procedure Act. But even for the purpose of ascertaining the understanding of Congress, whether in 1940 or in 1952, regarding the judicial review of citizenship determinations, the appellant's statement of the purport of the cases he cites is erroneous.[9]

None of them held that habeas corpus is the exclusive judicial remedy for citizenship claimants outside of the United States. The issue in each of the decisions was not the form of remedy but rather was the scope of the review. While it is true that each of the cases was a proceeding for a writ of habeas corpus, this was so because each claimant to citizenship was, at the time he initiated his action, held in detention by immigration authorities who refused to honor his claim. As *Chin Yow* v. *United States*, *supra*, 208 U.S. at 12, explains: "Habeas Corpus is the usual remedy for unlawful imprisonment."

Nor does the "governing principle" which appellant cites from *Ju Toy* that "due process of law does not require a judicial trial" for a citizenship claimant who has been "stopped at the limit of our jurisdiction" (Br. 24-25), mean that remedies other than habeas corpus are foreclosed for citizenship determinations.[10]

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[9] *United States* v. *Ju Toy*, 198 U.S. 253 (1904); *Chin York* v. *United States*, 208 U.S. 8 (1907); *Tang Tun* v. *Edsell*, 223 U.S. 673 (1911); *Nq Fung Ho* v. *White*, 259 U.S. 276 (1922); *Quon Quon Poy* v. *Johnson*, 273 U.S. 352 (1926).

[10] *United States* v. *Gay*, 264 U.S. 353 (1924), for example, was an action by a naturalized citizen of the United States, then residing in Switzerland, against the United States for retirement pay to which he was entitled if a citizen. The Court of Claims entertained the action notwithstanding the claimant's residence abroad and determined citizenship. See cases discussed *infra* at pp. 36-38.

All that may be said for the doctrine of the cited decisions is that Congress may constitutionally attach finality to administrative determinations of citizenship of claimants not in the United States and that absent a showing of abuse of authority, including an error of law, the administrative decision may not be set aside.[11] *Gonzales v. Williams*, 192 U.S. 1 (1904).

Manifestly, they are not holdings that habeas corpus is the sole remedy permitted by the Constitution or by statutes for citizenship determinations or that it is a remedy at all for a person who asserts a right of citizenship but who has not been taken into the custody of government officers.

The cited decisions fail to establish that the "prevailing judicial view" prior to 1940 was that citizenship claims could be tested only by habeas corpus arising from exclusion proceedings for a further reason.

Each of the citizenship claimants in the cases invoked by appellant was a "Chinese person".[12] They were made the targets of special legislation by Congress, the Chinese Exclusion Laws, 22 Stat. 58, 23 Stat. 332, 24 Stat. 414, 26 Stat. 566, 25 Stat. 504, 27 Stat. 25, 32 Stat. 176, 33 Stat. 397, 428, one of which expressly provided habeas corpus as the remedy for a "Chinese person seeking to land in the United States to whom that privilege has been denied . . ." Act of May 5, 1892, 27 Stat. 25, 8 U.S.C. 286. The fact that the Chinese person may have claimed to be a citizen

[11] As appellant notes, the doctrine of *Ju Toy* may have diminished force, apart from the provisions of the Administrative Procedure Act (fn. Br. 47). Cf. *Medeiros v. Watkins*, 166 F.2d 897, dissenting opinion (Frank J.) 900 (C.A. 2, 1948); and *Carmichael v. Delaney*, 170 F.2d 239 (C.A. 9, 1948).

[12] Although appellant states that the rule of *Ju Toy* "was applied generally" (Br. 27), the decisions cited stand for no more than the principle described in *Chin Yow* that "Habeas Corpus is the usual remedy for unlawful imprisonment", *supra*.

of the United States and the privilege to land denied upon a failure to establish the claim administratively, as *Ju Toy*, held, did not enlarge the scope of review or afford another remedy.

This provision, which has since been repealed along with all of the other Chinese Exclusion Laws as a "historic mistake" (Act of December 17, 1943, 57 Stat. 600, H. Doc. 335, 78th Cong. 1st Sess.), was never extended by Congress or by the Courts to other persons who asserted a right to land in the United States as citizens.

In summary, appellant's analysis of the development of the law prior to 1940 has transposed a judicial doctrine which holds merely that no constitutional right to a trial *de novo* may be asserted by a nonresident citizenship claimant into a Congressional understanding in 1940 that no judicial relief was available to such a non-resident other than that of a writ of habeas corpus.

This is not what the expert Cabinet Committee[13] which prepared the draft Nationality Code told Congress in 1938.[14] In its comments regarding the legal remedies of persons abroad who had been denied recognition as American nationals, the authors of the explanatory comments which accompanied the code assumed that actions for a

[13] The Committee, composed of the Secretary of State, the Attorney General, and the Secretary of Labor, was appointed in 1933, at the request of the House Committee on Immigration and Naturalization, to recommend revisions and codification of the nationality laws for submission to Congress. After a five year study, a draft code was submitted in June, 1938. *Supra*, Ct. *Perez* v. *Brownell*, 356 U.S. 44, 52-53 (1958); *Trop* v. *Dulles*, 356 U.S. 86, dissenting opinion 125 (1958).

[14] Nor is it what the Immigration and Naturalization Service advised its employees in its Immigration Manual in 1946. In its exposition of "Judicial Review of Administrative Decisions", it indicated the availability of the "writ of mandamus" under the Federal Rules of Civil Procedure, the Declaratory Judgment Act, stating specifically that "the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate", and Section 503 of the Nationality Act of 1940. See pp. 13031-13032.

declaratory judgment or for a writ of habeas corpus were both available.

The report stated:

> "It may be added that a person who shall have been denied recognition abroad as an American national by a diplomatic or consular officer of the United States upon the ground that such person had expatriated himself by the performance of one of the acts specified in this chapter would not be without a legal remedy in case he should deem the ruling in his case unjustified and such ruling should be upheld by the Department of State. If such a person should be unable to take advantage of the provision of Section 274D of the Judicial Code, as amended by the act of Congress of June 14, 1934 (48 Stat. pt. 1, 955), concerning declaratory judgments, he might upon arrival at a port of entry into the United States and denial of entry as a national, resort to *habeas corpus* proceedings upon the ground that he is entitled to enter the United States as a national thereof. There seems to be no doubt as to the possibility of having a judicial decision in cases of this kind, if a person applying for admission to the United States as a national thereof submits substantial evidence of the facts upon which his claim to American nationality may be based but is denied a fair hearing upon the facts, *Chin Yow* v. *United States* (1907), 208 U.S. 8, or the facts being admitted, he is denied admission upon the ground that under the law he has not American nationality, *Weedin* v. *Chin Bow* (1927), 274 U.S. 657."

Codification of the Nationality Laws of the United States, H.R. Comm. Print. pt. 1, 76th Cong. 1st Sess., Section 406, pages 504-505.

We thus come to the enactment of the Nationality Act of 1940.

(B) *Section 503 of the Nationality Act of 1940*

As the appellant has mistakenly equated the form of judicial remedy with the scope in his analysis of the decisions of this Court, so too has he erroneously transposed the purpose of Section 503 of the Nationality Act of 1940 from that of permitting citizenship claimants *to enter the United States in order to prosecute their claims* into a purpose to permit the use of declaratory judgment actions as a "new remedy".

Perkins v. *Elg*, *supra*, establishes that declaratory judgments were already available as a remedy for securing determinations of nationality. See also *Borchard, Declaratory Judgments*, p. 398. Nonresidence of the plaintiff in such an action does not vitiate his right to maintain the suit. *Anderson, Actions for Declaratory Judgment*, pp. 324-325. Neither is it a jurisdictional requirement. District of Columbia Code, 11-306-306. *Stark* v. *Wickard*, 321 U.S. 288 (1944).

What Section 503 sought to provide was not the right essentially to bring an action for declaratory judgment, but it was to afford the opportunity for the person abroad who had filed such an action *to enter the United States* to pursue his claim.

Congressman Rees, one of the House Managers of the bill (H.R. 9980, 76th Cong. 3rd Sess.), in explanation of the purpose of Section 503, declared that

> ". . . it was deemed advisable that some chance be given them (persons abroad who had been expatriated) to have what might be called their day in court. . . . It was my contention when this measure was up for consideration that such people did have the right to do into court either on a declaratory judgment or

under a writ of habeas corpus, but there was a feeling on the part of others that they may not have that right."

86 Cong. Rec. 13247

The feeling to which Congressman Rees referred was asserted by a witness before the House Committee on Immigration and Naturalization, Mr. Henry F. Butler, who originated the proposal contained in Section 503. The focus of Mr. Butler's concern was the physical ability of the citizenship claimant to gain entry to the United States to prosecute an action.

Said Mr. Butler:

> "He (the expatriated citizen) has no opportunity to be heard and there is no provision in here for any review, and there is no court abroad which has jurisdiction over the case.
>
> "It is suggested rather naively that he could come to the United States and when denied admittance at the port of entry sue out a writ of habeas corpus and have his case tried.
>
> "But how is he to get to the port of entry unless he happens to be in a contiguous country, because it is a serious offense for a steamship company to bring to a port of entry a person who is not in possession of a valid document of admittance to this country. He would practically have to be a stowaway."
>
> House Committee on Immigration and Nationality, Hearings, *supra*, on H.R. 6127, at page 285, superseded by H.R. 9980, 76th Cong. 1st Sess., pp. 285-286.

That the problem was not whether there was a judicial remedy, but rather was whether a citizenship claimant could return to the United States to be heard is underscored no

only by the nature of Mr. Butler's criticism of the bill as drafted, but by comments of the spokesmen for the Department of State and the Immigration and Naturalization Service, and by the ultimate remedy which Section 503 provided.

Thus the State Department representative, Mr. Richard W. Flournoy, Jr., indicated in a colloquy with the Chairman of the Committee that a petition for declaratory judgment or for a writ of mandamus would be available to the citizenship claimant abroad:

> "The CHAIRMAN. Assuming now that the State Department, for instance, within its jurisdiction refuses the right of an individual to return; or the State Department from the evidence it has in hand feels that the individual has expatriated himself, and therefore has no right to return. Assume further that this man has some evidence to the contrary and yet he is away from his mother country, and in addition he wants to get into the courts of this country, anywhere in the United States, to question the right of the State Department to disfranchise him, and the point as I understand it, and I think you will agree with me, under that view of the matter, as indicated by Mr. Butler, he is deprived of a judicial review."
>
> . . .
>
> "The CHAIRMAN. The State Department could have counsel representing it in court; the Labor Department could be represented by counsel so long as it is somewhere within the jurisdiction of this country, but in a foreign country of course it would have no jurisdiction; he would be beyond the court and could not get a passport.

"Mr. FLOURNOY. In order to insure his appearance in court he would have to arrive here.

"The CHAIRMAN. In the absence of the man's entry it would not be a proper procedure.

"Mr. FLOURNOY. If he demands the right of entry as a citizen and his citizenship has been denied—

"The CHAIRMAN. You are raising the question about the procedure he would have to follow?

"Mr. FLOURNOY. Yes. The question remains, whether while still abroad he would not be able to resort to a petition for declaratory judgment or for a writ of mandamus.

"The CHAIRMAN. I should think, gentlemen, that we ought to go a little step further, if I am not interrupting your thought, Mr. Flournoy, to say that such person may, upon application, be permitted under certain conditions which may be specified by the Department of State or the Department of Labor to enter the United States for a short period of time as a temporary person only.

"Mr. FLOURNOY. Yes.

"The CHAIRMAN. Under guaranty of a bond, in order that he may proceed to bring his action for the purpose of determining the declaratory judgment and if he is denied that right he must go back."

* * *

Hearings before the Committee on Immigration and Naturalization, House of Representatives, 76th Cong. 1st Sess. on H.R. 6127 superseded by H.R. 9980, at pages 291-292.

The representative of the Immigration and Naturalization Service, Mr. Thomas B. Shoemaker, indicated his disagreement with the State Department position, but added his concern that even though he (the citizenship claimant abroad) should come over (to the United States) under some specific arrangement which was provided in the order, it would be open to question, at that point, whether you would ever get him out again". *Ibid.*

As enacted, Section 360 was therefore designed to permit a citizenship claimant abroad and who has instituted judicial action for a judgment declaring him to be a national of the United States, to be admitted to the United States upon a certificate of identity, subject to the condition that he shall be deported in the event of an adverse decision.

This remedy plainly bears no resemblance to an action such as the one brought below by the appellee, for a declaratory judgment in which the claimant can use the right or means of entry to the United States unless he has first prevailed in his claim to citizenship.

It is in this context that Section 360 of the present Immigration and Nationality Act must be understood.

(C) *Section 360 of the Immigration and Nationality Act of 1952*

The problem with which Congress was concerned when it formulated the provisions of Section 360 of the 1952 Act was the one which Mr. Shoemaker had mentioned [illegible] the use of certificates of identity by aliens seeking admission to the United States. It was not [illegible] pellant's brief seeks to convey — that the cases presented special and complex problems for the judicial process [illegible] (with) [illegible] factual issues difficult to resolve [illegible]

almost impossible to evaluate due to barriers of language and culture * * *." Br. 30.

The Report of the Senate Committee which conducted an intensive investigation of immigration and nationality problems for two-and-a half-years found no such problem. The sole issue which it asserted was that Section 503 "has been used in a considerable number of cases to gain entry into the United States where no such right existed." Senate Rep. 1515, Committe on the Judiciary, 81st Cong., 2nd Sess., p. 777. See also Joint Hearings, *supra*, pp. 108, 443.

Indeed, the present Solicitor General's predecessor conceded in this Court that the problem was the existence of numerous fraudulent entries to the United States by spurious citizenship claimants. See Petitioner's Brief, *Brownell v. Shung*, No. 43, October Term, 1956, fn. p. 54, where he stated the hearings on the 1952 Act:

> "indicate that the concern was with 'the fraud and derivative citizenship cases', and the fact that aliens not entitled to admission were gaining physical entry into the United States through Section 503 of the 1940 Act and then disappearing into the general populace * * * (citing the Joint Hearings) * * *."

As the appellant has noted, there were divergent approaches to the solution of the problem. But none of the suggested proposals was directed to the judicial remedies available under the Administrative Procedure Act, or, specifically, to the availability of the Declaratory Judgment Act. They were focused rather upon the method of modifying the Section 503 procedure in order to prevent the entry to the United States of spurious citizenship claimants.

The first versions of the immigration bills, S. 3455, *supra*, and S. 716, *supra*, limited the special declaratory judgment

proceedings to persons within the United States. The Immigration and Naturalization Service favored this proposal, noting in its Analysis of S. 716, *supra*, that:

> "Section 503 authorizes a person who is outside the United States to come to this country after filing such a suit in order to prosecute it to a conclusion * * *. The Service believes that, by limiting the availability of this section to persons within the United States, the *bill will remove from the law one method of obtaining easy entry into the United States.*" (Emphasis supplied.)

The Department of Justice and the State Department, however, were opposed to this draft. They favored changes in Section 360 in order to provide a continued opportunity for citizenship claimants to appear in the courts of the United States to obtain judicial determinations of the denials of their claims.

The proposals of the two departments were dissimilar. The Department of Justice favored a limitation of the judicial remedy in Section 360 to that of habeas corpus. It proposed the issuance of certificates of identity or special visas for "persons abroad who have more than a frivolous claim to citizenship" by means of which such persons could proceed to a port in the United States and apply for admission. The purpose, said the Department, was to permit the Immigration and Naturalization Service to "have as complete a record as possible on each person entering this country claiming to be a national thereof". Joint Hearings, *supra*, p. 721.

The State Department, for its part, favored the retention of Section 503, with the modification that the Secretary of State's decision on the issuance of certificates of identity shall be final. *ibid.* p. 710.

Section 360 (b) and (c) as adopted followed substantially,

the Department of Justice proposal. S. 2055. *Supra.* S. 2550. *Supra.* 8 USC 7503 (b)-(c). In describing the purpose of the provision, the Senate Judiciary Committee, stating that "*The bill modifies Section 503 of the Nationality Act of 1940*" explained that it provides:

> "that any person *who has previously been physically present in the United States but who is not within the United States* who claims a right or privilege as a national of the United States and is denied such right or privilege by any government agency *may be issued a certificate of identity for the purpose of traveling to the United States and applying for admission to the United States.* The net effect of this provision is to require that the determination of the nationality of *such person* shall be made in accordance with the normal immigration procedures. The procedures include review by habeas corpus proceedings where the issue of the nationality of the status of the person can be properly adjudicated." S. Rep. 1137, *supra*, p. 50. (Emphasis supplied.)

IV. The Legislative History and Statutory Language Show That the Habeas Corpus Remedy in Section 360 Is Not Exclusive.

The "such person" referred to in the Senate Report does not describe, as appellant would parse the paragraph, "a claimant not within the United States" (Br. 44). It refers instead to a "person who has previously been physically present in the United States, and who, being out of the United States, has been issued a certificate of identity for the purpose of traveling to the United States and applying for admission".[15]

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[15] In view of the subsequent change in the bill permitting this benefit to be granted persons under the age of 16 years who were born abroad

"Plainly, the legislative history and the language of Section 360 establish that its purpose was to eliminate the easy entry to this country which was permitted by the issuance of certificates of identity to citizenship claimants who had filed actions for declaratory judgments under the special statutory provisions of Section 503,[18] but at the same time to retain an opportunity for certain limited citizenship claimants to present themselves personally at a port of entry which, absent proof of citizenship or a valid visa, they could not do. Section 273, Immigration and Nationality Act, 66 Stat. 227, 8 U.S.C. 1323. Cf. Section 215, 66 Stat. 190, 8 U.S.C. 1185.

Thus, persons over the age of 16 years and those who have not previously been in the United States are denied this opportunity, notwithstanding the fact that under Section 301(a) of the Immigration and Nationality Act, 66 Stat. 235-236, 8 U.S.C. 1401, they may be citizens by reason of birth outside the United States to (3) citizen parents, (4) one citizen and one national parent, or (7) one citizen and one alien parent.

Appellant dismisses the problems of those citizenship claimants who are not "eligible for travel documents under Section 360(b)" and thus not able to review the denials of their claimants to citizenship in habeas corpus proceedings under Section 360(c) with the flourish that "this case does not involve them" (Br. 46).

But the fact that Congress has given citizenship to certain persons in Section 301 of the statute, with no mention

to a citizen parent, the phrase, as enacted, encompasses that person as well. 8 USC 1503(b).

[18] Which unlike the general Declaratory Judgment Act permitted the action to be brought against the Secretary of State in the district court for the district in which the litigant claims permanent residence rather than in the District of Columbia. Cf. *Savorgnan* v. *United States*, 338 U.S. 491, 493-4 (1949), and *Gong* v. *Biddle*, 60 F. Supp. 530, 531 (E.D. Penna., 1945).

of the method for vindicating *their* claims to citizenship in Section 360, manifestly indicates that Section 360 is neither the comprehensive enumeration of judicial remedies for determinations of citizenship nor the exclusive remedy for each of the persons described in Section 301.

There are, of course, numerous other actions in which the United States citizenship of a person may be established. The earliest decisions of courts of the United States determined citizenship claims of persons residing abroad in connection with the rights of inheritance to land. Thus, *McIlvaine* v. *Coxe's Lessee*, 2 Cranch. 280 (1805); 4 Cranch. 208 (1808) involved a New Jersey born resident of England and rendered judicial determination of citizenship in an action for land. *Inglis* v. *Trustees of the Sailor's Snug Harbor*, 3 Pet. 99 (1830), and *Shanks* v. *Du Pont*, 3 Pet. 242 (1830), similarly were actions, one a writ for recovery of land, the other a suit for partition, which required a determination of citizenship in the United States of residents abroad. Cf. *Oyama* v. *California*, 332 U.S. 633 (1947), in which a proceeding to escheat lands owned by aliens ineligible to citizenship involved the question of ownership of land by a minor United States citizen of Japanese ancestry. The minor citizen was a nonresident of California at the time of the proceeding, whether of Japan or Arizona would have made no difference. (637)

Earlier decisions of this Court presented libels involving the issue of citizenship in the United States for the legality of captures of vessels at sea and entitlement to prizes. In *Murray* v. *The Charming Betsy*, 2 Cranch 64 (1804), the legality of a seizure of a ship by an officer acting under the instructions of the President of the United States (67), turned upon whether the owner of the vessel, a nonresident, was a citizen of the United States. Although the Court (Chief Justice Marshall) determined that

the libelee was not a citizen, and held the capture of the vessel illegal, jurisdiction of the libel, of course, was not affected by the residence of the libelee.[17] Cf. *Talbot* v. *Jansen*, 3 Dall. 133 (1795); *Santissima Trinidad*, 7 Wheat. 283, 347 (1822).

The leading case of *MacKenzie* v. *Hare*, 239 U.S. 299 (1915), while not involving a citizenship claimant residing abroad, was an action in mandamus against election officials to compel registration as a voter in California. What is significant here is that the statute in issue and which this Court upheld there provided that:

> "At the termination of the marital relation she (the American woman who marries a foreigner) may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States * * *." 34 Stat. at L. 1228.

Clearly, if the issue of citizenship may be determined in an action for mandamus against a California election official to permit voting in a state election, it may also be decided in mandamus proceedings by an American woman, "if abroad", against the Secretary of State to compel registration as an American citizen with a consul of the United States pursuant to the express provision set forth in the statute.

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[17] Chief Justice Marshall, pertinent to the issue here, stated in his opinion (120) that "The American citizen who goes into a foreign country, * * * is yet * * * entitled to the protection of his own government * * *, and if * * * he should be oppressed unjustly, he would have the right to claim that protection * * *." In the Solicitor General's view, if the United States declined to protect the person abroad on grounds of lack of citizenship, the citizenship claimant must abandon the very residence abroad which he seeks to protect, in order to return to a port of entry of the United States, standing at its gates as an alien, in order to establish his citizenship and his right to protection abroad.

Finally, as has been noted earlier, a claim to citizenship asserted from abroad by a person who had been ruled expatriated was determined in *United States* v. *Gay*, *supra*, in an action for money judgment.

Claims to citizenship thus may be established in a variety of actions brought in the courts of the United States by nonresidents. Whether the ultimate relief sought is title to land, restitution of a vessel captured at sea, the right to be registered as a citizen with an American consulate abroad, a retirement pension, or, as here, a passport, obviously is not the determinant of the jurisdiction of the courts to entertain the action.

Appellant, with no Congressional language to support him, would read into Section 360(b) and (c) an intent by Congress to deprive persons abroad of all of the diverse judicial remedies which they have hitherto had when they have been "denied rights or privileges" upon the ground that they are "not nationals of the United States." Section 360(b).

Apart from the fact that nonresident citizenship claimants have had available to them historically the judicial remedies we have reviewed, appellant's position here is made the more anomalous by the decisions in *Stewart* v. *Dulles*, 101 App. D.C. 280, 248 F. 2d 602 (1957) and *Bauer* v. *Acheson*, 106 F. Supp. 445, (D.C. 1952).

In *Stewart*, a nonresident citizen living in England was able to maintain a declaratory judgment action in the United States District Court for the District of Columbia against the Secretary of State to litigate a far less substantial issue than here, namely, whether there was compliance with the administrative regulations required for the issuance of a passport. In *Bauer*, the plaintiff was a nonresident living in Paris, and, like the appellee below, challenged the con-

stitutionality of an act of Congress in asserting her right to a passport.[18]

Appellant's position is thus reduced to the absurdity that a person outside of the United States has the right to judicial review of his claim to citizenship for any relief except that of a passport, and he has the right of judicial review to obtain a passport upon any ground except that of citizenship.

More, in view of *Kent* v. *Dulles* (see fn. 18), an American citizen would be able to exercise his constitutional liberty to travel abroad but only at the risk, if the appellant's view were to prevail, of losing his citizenship without judicial recourse. Needless to say, the right to travel cannot be so inhibited.

The absurdity is compounded in the light of *Flemming* v. *Nestor*, 363 U.S. 603 (1959). There, an alien who had been deported from the United States was able, while in Bulgaria, (which the United States then did not recognize)[19] to maintain a declaratory judgment action in the District Court for the District of Columbia to challenge the constitutionality of an act of Congress. While it is true that Section 205(g) of the Social Security Act, 53 Stat. 1370, as amended, 42 U.S.C. 405(g), relevant there, provides for judicial review without limitation as to nonresidents or alienage, it seems dubious that Congress could have intended that nonresident aliens should have the right to bring actions from abroad to challenge the constitutionality of an act of Congress, but to have precluded that right to a native-born citizen of the United States who has been ex-

[18] Although this Court has not passed upon the jurisdictional issues in these cases, *Kent* v. *Dulles*, 357 U.S. 116, 125, 126 (1957) assures that the right of travel may not be deprived without due process of law, which certainly, as to an American citizen even if then outside of the United States, includes the right of judicial review of passport denials.

[19] Dep't State Press Release 226 (1959).

patriated under a statute adopted by Congress. Cf. *Puig v. Jiminez*, 255 F. 2d 54 (C.A. 1, 1958).

Yet this is the effect of the Solicitor General's argument to this Court.

In summary, all that can be said for Section 360(b) and (c) is that Congress has chosen to provide two classes of citizenship claimants—persons who have had prior physical presence in the United States and persons under the age of 16 years born abroad of a citizen parent—with an opportunity to come to a port of entry in the United States to litigate their claims to citizenship.

V. Section 360(c) Is Not a "Special Statutory Review Proceeding"

Appellant has not posited his argument that Section 360(c) is exclusive, as we have observed earlier, upon any claim that it is a "special statutory review proceeding" within the meaning of Section 10(b) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009(b).

His brief relies rather upon the art of ambiguity. For he says vaguely that "Section 360 establishes special procedures for determining claims to American citizenship by those within and without the country." (Br. 23.)

The judicial procedure referred to in Section 360(c) is habeas corpus. This remedy, deriving as it does from the Constitution is, of course, not a "special procedure", as appellant himself has observed on other pages of his brief (Br. 12-13, 24-27). Neither can it be deemed a "special statutory review proceeding" within the meaning of the Administrative Procedure Act. This is so both because habeas corpus is not such a proceeding and because the action which a citizenship claimant would have under Section 360(c) is not against the Secretary of State who has refused to recognize his citizenship and has denied him a passport, but it is against the officer of the Immigration and

Naturalization Service who will not let him into the United States and who holds him in detention.

The appellant, in effect, would immunize the Secretary of State from suit by those whom he had deprived of citizenship. This position, apart from being contrary to the provisions of the Administrative Procedure Act which provides that "any person suffering legal wrong because of *any agency action* . . . shall be entitled to judicial review *thereof*" 5 U.S.C. 1009(a), would constitute a taking of life, liberty and property without due process of law in violation of the Fifth Amendment. (Emphasis supplied.)

For the effect of appellants' position, assuming that a citizenship claimant obtained a certificate of identity, as permitted in Section 360(b), is to require the claimant to come to the United States, not as a citizen, but as an alien and to be "subject to all the provisions of the (Immigration and Nationality) Act involving *aliens* seeking admission to the United States" (8 U.S.C. 1503(c)). (Emphasis added).

The claimant could be held in detention without bond and afforded no constitutional guaranty of due process while attempting to vindicate his claim to citizenship. *Shaughnessy* v. *Mezei*, 345 U.S. 205 (1952).

Although this Court's decision in *Na Fung Ho* v. *White*, *supra*, 284-285, involved a citizenship claimant in the United States, in view of this Court's repeated subsequent holdings in expatriation cases[20] Justice Brandeis' language there seems sufficient to protect a native-born citizen of the United States, who has been expatriated by an administrative action, regardless where he may live:

> ". . . Against the danger of such deprivation (of citizenship) without the sanction afforded by judicial pro-

[20] *Schneiderman* v. *United States*, 320 U.S. 118 (1942); *Baumgartner* v. *United States*, 322 U.S. 665 (1943); *Gonzales* v. *Landon*, 350 U.S. 920 (1955); *Nishikawa* v. *Dulles*, 356 U.S. 129 (1957).

ceedings, the 5th Amendment affords protection in its guaranty of due process of law" (284-285) [21]

VI. The Objectives Which Appellant Describes for Section 360 Do Not Require a Holding That It Is Exclusive.

The Solicitor General suggests that the objective of Section 360 was to require citizenship claimants abroad to go through "screening, interrogation, and investigation" of an expert agency (the Immigration and Naturalization Service) (Br. 40-42). "State Department officials abroad cannot, in the nature of their duties and responsibilities", he says (Br. 41), "conduct the type of detailed inquiry and formal hearings available at a port of entry of the United States."

This rationalization for depriving citizenship claimants abroad of the judicial remedies permitted by the Administrative Procedure Act can be made by the Solicitor General only in ignorance of the manifold functions and duties of the Secretary of State.

Section 104(a) of the Immigration and Nationality Act, 64 Stat. 174, 8 U.S.C. 1104, provides that the "Secretary of State shall be charged with the administration and the enforcement of the provisions of this Act and all other immigration and nationality laws relating to . . . (3) the determination of nationality of a person not in the United States."

State Department officials thus constantly make determinations of nationality, in and out of the United States, in the issuance of passports, Cf. 22 C.F.R. 51, in the issuance of certificates of loss of nationality, Cf. 22 C.F.R.

[21] The doctrine of *Ju Toy*, *supra*, is inapposite because no issue of *expatriation* was involved but only whether the claimant to citizenship had established his claim.

50, and in the issuance of visas to persons who are related to citizens of the United States (Cf. Sections 101(a) 27 and 203, Immigration and Nationality Act, 66 Stat. 169, 178-179, 8 U.S.C. 1101, 1152; 22 C.F.R. 42.

It seems needless to say, in response to the implications of the Solicitor General's brief (Br. 41, 42), that the officials of the State Department are as "expert" as those of the Immigration and Naturalization Service in "appraising obtuse and difficult factual allegations", in "sifting out the manifestly frivolous claim", in "illumining and sharpening the basic facts in the issue", and in "adding new evidence". The hearing which is required for the Immigration Service determinations is no less required for State Department determinations. Cf. *Baker* v. *Acheson*, *supra*.

Indeed, in view of the Solicitor General's suggestion (Br. 39) that the federal courts, sitting as they do in the United States, found it "almost impossible to evaluate" the factual issues involved in the citizenship claim "with respect to events occurring . . . thousands of miles away" because "of barriers of language and culture", the appellant, if not his counsel, might well argue that the State Department officials abroad are better equipped to "screen, interrogate, and investigate" the citizenship claims of nonresidents than are the Immigration Service officials.

Whichever other agency performs the function, inasmuch as Congress has given the Secretary of State the duty "to determine nationality of a person not in the United States", 8 U.S.C. 1104, *supra*, the Solicitor General's suggestion that the purported objective of Section 360 cannot be met unless the Immigration and Naturalization Service performs the screening, the interrogation, and the investigation of citizenship claimants is transparently a frivolous contention.

Conclusion

For the reasons the amicus curiae has advanced, there is no warrant in the prior decisions of this Court, there is no basis in the legislative history of the Immigration and Nationality Act of 1952, and there is no requirement in the statutory language contained in Section 360 of that Act for the doctrine that a nonresident claimant to citizenship may not maintain an action for a declaratory judgment to determine whether he is a citizen of the United States.

Accordingly, the decision of the court below on the issue of jurisdiction should be affirmed.

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